SUPREME COURT, U. S.

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No. 34

Supreme Court of the United States

October Term, 1969

MICHELE MARCHESE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

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In the Government's opposition to certiorari filed by petitioner, the Solicitor General states that petitioner "argues that the carrying of the radio device by the informer violated petitioner's constitutional rights under *Katz v. United States,* 389 U.S. 347, and that the *Katz* decision should be applied retroactively even though the judgment had become final."

Apparently, the Solicitor General misconstrued the petition, as petitioner admitted that under *Desist v. United States,* 394 U.S. 244, the new doctrine announced in *Katz* was not retroactive; namely, that the Fourth Amendment protects persons as well as places. Petitioner, in fact, bases his argument on rules announced by this Honorable Court

long before *Katz*, in cases cited in the petition, which we respectfully call to the attention of the Court.

The Solicitor General cites the case of *Kaufer v. United States*, 394 U.S. 458, as holding that the *Katz* case is not retroactive with respect to a hidden transmitter carried with the consent of one party to the conversation. In *Kaufer* the Court granted certiorari and affirmed the conviction.

The *Kaufer* case as decided by the lower court (406 F.2d 550) is clearly distinguishable from the instant case in four principal respects; namely, (a) a recording was made of the conversation overheard through the electronic device and the tape was used to corroborate the agent's testimony; (b) the defendant knew that he was talking to a federal agent and that what he said might be used against him; (c) the transmission was made in a public place; and (d) the conviction was also based upon an agent listening to a telephone conversation by means of an extension telephone–as authorized in *Rathbun v. United States*, 355 U.S. 107. In the instant case:

First, there was no recording made and no tape produced to corroborate the conversation. Furthermore, the agents were permitted, over objection, to testify as to what they heard over the receiving device, and this testimony was in conflict with the testimony of the "informer," or "special employee," Susman, a dope addict.

Second, petitioner thought he was talking to a close friend of long standing, who gained access to Marchese's apartment through fraud, deceit and trickery.

Third, the transmission took place from Marchese's apartment–a private home–after Susman had gained access, in the guise of friendship, through fraud, trickery and deceit.

Fourth, there is, in the instant case, no issue of the listening by the agents by means of an extension telephone.

With respect to the finality of the judgment, we again call the Court's attention to the fact that repeatedly petitioner sought a ruling on the issue of the use of the hidden transmitting device, but the Ninth Circuit Court of Appeals avoided a direct ruling until the last appeal. In its decision at that time, it relied on the wholly inapposite case of *Osborn v. United States,* 385 U.S. 323.

The Solicitor General, in Note 1, states that petitioner seeks to reargue the issue as to Judge Clarke's order to reduce petitioner's sentence to time served, and thus misconstrues the effect of the order. While Judge Clarke, as part of the order, attempted to reduce the sentence from ten to five years, such was only done to implement and support his intended order of discharge for time served, regardless of the length of the sentence. We have raised this issue again herein as we feel that this Court should consider it in connection with the petition for certiorari on the denial of the Section 2255 motion and habeas corpus, and determine that petitioner be discharged.

CONCLUSION

We respectfully urge this Honorable Court to grant the petition for certiorari and order the petitioner to be discharged.

Respectfully submitted,

RUSSELL E. PARSONS and
BURTON MARKS

Attorneys for Petitioner

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)

) ss.

County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 315 Third Street, Huntington Beach, California 92646, that on OCT 14, 1969, I served the within REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION (October Term, 1969 – No. 444) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

ERWIN N. GRISWOLD, SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530 [3 COPIES]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
7TH & MISSION STREETS
P. O. BOX 547
SAN FRANCISCO, CALIFORNIA 94101 [1 COPY]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Oct 14, 1969, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

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